United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

77-6119

To be argued by:
MURRAY A. GORDON, ESQ.

United States Court of Appeals

For the Second Circuit

Docket No. 77-6119

BERALDINE L. ACHA and ARLENE M. EGAN, each individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

against

ABRAHAM D. BEAME, individually and in his capacity as Mayor of the City of New York, MICHAEL J. CODD, individually and in his capacity as Police Commissioner of the New York City Police Department, and THE CITY OF NEW YORK, as a public employer,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

	Page
Facts	1
Argument	
I. It Was Error To Grant The Rule 60(b), Fed. R.Civ.P., Motion.	3
II. Plaintiffs Are Entitled, Pursuant To Title VII and 42 U.S.C. §1983, To The Relief Vacated And Denied To Them By The Court Below	14
A. Teamsters and Evans do not sustain the decision below so far as it deals with Title VII	18
B. The decision of the court below was also in error by reason of §1983	28
Conclusion	34

TABLE OF AUTHORITIES

Cases:	Page
Acha v. Beame, 531 F.2d 648 (2d Cir. 1976)	29
Ackermann v. United States, 340 U.S. 193 (1950)	9, 14
Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)	25
Berryhill v. United States, 199 F.2d 217 (6th Cir. 1952)	9, 11
Block v. Thousandfriend, 170 F.2d 428 (2d Cir. 1948)	11
Brown v. General Services Administration, 507 F.2d 1300 (2d Cir. 1974), aff'd 425 U.S. 820 (1976)	28
Brown Shoe Co. v. United States, 370 U.S. 294 (1962)	5, 6
Burns v. Alcala, 420 U.S. 575 (1975)	13
Butler v. Eaton, 141 U.S. 240 (1891)	11
Cates v. Trans World Airlines, 15 FEP Cases 329 (2d Cir. 1977)	14,19,30,31
Chance v. Board of Examiners, 534 F.2nd 993 (2d Cir. 1976), cert. den., 45 U.S.L.W. 3806 (1977)	28, 29,30,32
Chance v. Board of Examiners, Docket No. 76-7348 (2d Cir. August 11, 1977)	29
Class v. Norton, 507 F.2d 1058 (2d Cir. 1974)	8
Collins v. City of Wichita, Kansas, 254 F.2d 837 (10th Cir. 1958)	9,11,12
Delta Drilling Co. v. Arnett, 186 F.2d 481 (6th Cir. 1950), cert. den., 340 U.S. 954 (1951)	6
Diamond v. Thompson, 523 F.2d 1201 (5th Cir. 1975)	6
Durkin v. Mason & Dixon Lines, 202 F.2d 425 (6th Cir. 1963)	6
Ehlert v. United States, 402 U.S. 99 (1971)	10
First Federal Savings & Loan Ass'n. v. Zequeira, 305 F.Supp. 37 (D.P.R. 1969)	6
Forgay v. Conrad, 47 U.S. (6 How.) 201 (1848)	5
Franks v. Bowman Transportation Co., 424 U.S. 747 (1976)	19,20

Page

Griggs v. Duke Power Co., 401 U.S. 424 (1971)..... 21,25

Hazelwood School District v. United States, 45 U.S.L.W. 4882 (1977)..... 18,26,27

International Brotherhood of Teamsters v. United States, 97 S.Ct. 1843 (1977)..... 7,18,19,20, 21,22,23,26, 29,30,32

Lane v. Local Board No. 17, 319 F. Supp. 1355 (D. Mass. 1979)..... 10,11

Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737 (1976)..... 3,5

Loucke v. United States, 21 F.R.D. 305 (S.D.N.Y. 1957). 9

Loy v. City of Cleveland, 8 FEP Cases 614 (N.D. Ohio 1974)..... 33

Lubben v. Selective Service System Local Board No. 27, 453 F.2d 645 (1st Cir. 1972)..... 10,11,12

Lummus Co. v. Commonwealth Oil Refining Co., 297 F.2d 80 (2d Cir. 1961), cert. den., 368 U.S. 986 (1962)..... 6

Michigan Surety Co. v. Service Machinery Corp., 277 F.2d 531 (5th Cir. 1960)..... 11

Mize v. State Division of Human Rights, 31 N.Y. 2d 1032 (1973)..... 33

Monnell v. Department of Social Services, 532 F.2d 256 (2d Cir. 1976), cert. gr., 45 U.S.L.W. 3508 (1977).....33

Morse-Starrett Products Co. v. Steccone, 205 F.2d 244 (9th Cir. 1953.....9

Rabekoff v. Lazere & Co., Inc., 323 F.2d 865 (2d Cir. 1963)..... 4

Schaefer v. Tannian, 394 F. Supp. 1128 (E.D. Mich. 1974), modified , 528 F.2d 1234 (6th Cir. 1976)..... 33

Schildhaus v. Moe, 335 F.2d 529 (2d Cir. 1969)..... 8

Scholl v. District of Columbia, 331 F.2d 1018 (D.C. Cir. 1964)..... 7

	Page
Shpritzer v. Lang, 13 N.Y. 2d 744 (1963).....	33
Theriault v. Smith, 519 F.2d 809 (1st Cir. 1975).....	12
Theriault v. Smith, 523 F.2d 601 (1st Cir. 1975).....	12,13
Title v. United States, 263 F.2d 28 (9th Cir. 1959), cert. den., 359 U.S. 989 (1959).....	8,9,10,11
United Air Lines v. Evans, 97 S.Ct. 1885 (1977).....	7,18,19,22, 23,26,29
United States v. Cirami, 178 N.Y.L.J. September 16, 1977, at 13, col. 2.....	13,14
United States v. Hazelwood School District, 534 F.2d 805 (8th Cir. 1976), vacated 45 U.S.L.W. 4882 (1977).	27
United States v. Karahalias, 205 F.2d 331 (2d Cir. 1953).....	14
United States v. Swift & Co., 286 U.S. 106 (1932).....	13
Wagner v. United States, 316 F.2d 871 (2d Cir. 1963)...	8
Wallace Clark & Co., Inc. v. Acheson Industries, Inc., 394 F. Supp. 393 (S.D.N.Y. 1975), aff'd 532 F.2d 846 (2d Cir. 1976), cert. den., 425 U.S. 976 (1976).....	8
Zdanok v. Glidden Company, 327 F.2d 944 (2d Cir. 1964).	6

Statutes

Fourteenth Amendment - United States Constitution.....	28
28 U.S.C. §1292(a)(1).....	4,5
28 U.S.C.§1292 (b).....	7
28 U.S.C. §2107.....	8
42 U.S.C. §602(a)(10).....	12
42 U.S.C. §606(a).....	12,13
42 U.S.C. §1983.....	14,15,27,28, 29,30,31,32,33
42 U.S.C. §2000e-2(h).....	18,20,21,23. 25,29,30

	Page
42 U.S.C. §2000e-5(e)	31
42 U.S.C. §2000e-6	27
Fed.R.Civ.P. 1	5
Fed.R.Civ.P. 23(d)	6
Fed.R.Civ.P. 54(6)	3,6,7
Fed.R.Civ.P. 60(b)	3,4,7,8,9, 10,11,12,13, 14,23,24,28, 29
32 CFR §1625-2	10
N.Y.Civ. Ser. Law §80	1
N.Y. City Admin. Code §434-1.0	1, 17
N.Y. City Admin. Code §434-2.0	1, 17

Other Materials

H.R. Rep. No. 92-238, 92d Cong., 2d Sess. (1972)	28
Chayes, "The Role of the Judge in Public Law Litigation," 89 Harv. L. Rev. 1281 (1976)	6
EEOC Interpretative Memorandum, 95 LRRM 235 (1977)	25
6 Moore's Federal Practice, ¶54.42	7
9 Moore's Federal Practice, ¶110.11	5,7
Note, "Developments in the Law-Class Actions," 89 Harv. L. Rev. 1319 (1976)	6

UNITED STATES COURT OF APPEALS
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BERALDINE L. ACHA and ARLENE M. EGAN, each individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

-against-

ABRAHAM D. BEAME, individually and in his capacity of Mayor of the City of New York, MICHAEL J. CODD, individually and in his capacity as Police Commissioner of the New York City Police Department and THE CITY OF NEW YORK, as a public employer,

Defendants-Appellees.

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REPLY BRIEF OF PLAINTIFFS-APPELLANTS

Facts

The brief of defendants-appellees ("D.Br.") contains various assertions which require correction.

Reference is made to "layoffs...in the inverse order of seniority in the position of Police Officer pursuant to Section 80." D.Br. 4. No civil service title of "Police Officer" existed at the time of the lay-offs. By force of law, males in the uniformed forces of the Police Department ("PD") held the separate title of Patrolman (New York City Administrative Code §434a-1.0, subd. 7), and women could hold "but one rank and grade...and they shall be known as policewomen" (id. §434a-2.0, subd. d). Similarly defendants incorrectly allege that "[i]n February 1973, the budget lines

for the positions of Policewoman and Patrolman were merged into a single line," and that in April 1973 the positions were merged by the Police Commissioner into the position of Police Officer. D.Br. 4-5. The defendants stipulated at the hearing before the District Court on June 30, 1974:

> "For the purpose of the Budget Bureau the titles were not merged." (A. 84; see also Comptroller print-out at AD. 22, 37-39.)

PD records following April 1973 indicate consistent reference to women as "Police Officers Female." A. 23, 536-37; AD. 89, 97-106. Differentials between Patrolman and Policewoman assignments necessarily existed by reason of the heavy incidence of matron duty performed by Policewomen exclusively. A. 269-70; AD. 89-90, 107-11.

Defendants allege that no class member "adduced any evidence that she was the victim of discrimination" after 1969. D.Br. 10. Each class member took a PD examination in 1964 or 1969, and claimed she would have been appointed earlier but for discrimination. But each also "adduced...evidence" in the court below of post-1969 discrimination in the hiring practices of 1970-74, and the lay-off roster and lay-offs of 1975. See pp. 15-18 infra.

Defendants allege that on "August 16, 1977, this Court continued the stay entered by the District Court" "to hold 11 positions open" for 11 class members found by the Special Master to be discriminatees. D.Br. 12. The terms of the August 16 order of this Court granted, until oral argument of the appeal, the plaintiffs' motion for a stay of all PD rehiring unless the revised seniority dates of the 11 discriminatees were reflected in such rehirings.

AD. 16. This order has not been complied with and, instead, 11 positions have been held unfilled as Judge Duffy specified. AD. 51, 73.

Argument

I.

IT WAS ERROR TO GRANT THE RULE 60(b), FED.R. CIV.P., MOTION.

Defendants argue that the partial summary judgment was not a final judgment,--because not fully dispositive of a claim in the action,--and could not be made final by the Rule 54(b), Fed.R.Civ.P., certification (citing Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737 [1976]), and, therefore, was an interlocutory order not binding as a matter of res judicata.[1/] D.Br. 20-24. The defendants also contend that even if final, the judgment was properly vacated under Rule 60(b). D.Br. 24-6. The partial summary judgment was, however, final for purposes of appealability as well as res judicata, and to treat it otherwise would seriously jeopardize the judicial administration of complex civil rights class actions. All relevant law and authority foreclose vacating such a final judgment on the Rule 60(b) grounds cited by the court below.

(1)

The partial summary judgment established defendants' liability under Title VII to 38 named class members-discriminatees; permanently ordered and adjudged revised seniority dates of no later than May 8, 1970 for those discriminatees; permanently

1/ Defendants did not move in the District Court to set aside the Rule 54(b) certification when it was first issued. Nor did (contd.)

ordered and adjudged that such seniority dates be applied by defendants to the 38 discriminatees' salary level, promotional opportunities, retention, future reinstatement, demotion, lay-off, assignment, transfer, and vacation selection; and permanently enjoined any rehiring by defendants which did not reflect the revised seniority dates of the 38 class members. A.315-18. Matters of earlier seniority dates, bumping, back pay, retroactive pension contributions, and counsel fees were reserved for later decision. A. 317-18. Defendants acknowledge that, pursuant to the described direction, "the 38 women granted partial summary judgment by the District Court were also reinstated based on a May 8, 1970 constructive seniority date." D.Br. 9-10. Those reinstatements were, as defendants have insisted throughout (AD. 52-53; see also A. 67, 94, 267, 272), in place of 38 others whose seniority was subordinated to the 38 discriminatees because of the judgment.

Obviously the described declaration of liability and permanent injunctive relief are not interlocutory, as defendants claim (D.Br. 24), but final as to those matters they decided. The issue here arises because the matters so determined are partial and not full dispositions of any claim of plaintiffs. Finality in such circumstances for purposes of appealability and/or res judicata involves pragmatic not mechanical considerations.

(cont'd): they appeal from the certification or seek to vacate it by mandamus. See Rabekoff v. Lazere & Co., Inc., 323 F.2d 865, 866 n. 1 (2d Cir. 1963). Instead an appeal was taken which was not limited to the injunction,--which was appealable pursuant to 28 U.S.C. §1292 (a)(1),--but referred as well to the partial summary judgment thereby suggesting its appealability as a final judgment. AD. 40. Even now the partial summary judgment is challenged by defendants only by way of Rule 60(b) which is limited to motions to relieve a party "from a final judgment, order or proceeding."

> "The [Supreme] Court has adopted essentially practical tests for identifying those judgments which are, and those which are not, to be considered 'final' [Citations omitted] A pragmatic approach to the question of finality has been considered essential to the achievement of the 'just, speedy, and inexpensive determination of every action' [Rule 1, Fed.R.Civ.P.]: the touchstones of federal procedure." [Brown Shoe Co. v. United States, 370 U.S. 294, 306 (1962).]

Precisely such functional considerations obtain where, as here, partial final determinations have the immediate and substantial irreparable effects which defendants perceive are suffered by those not reinstated to the PD solely by reason of the partial summary judgment and its permanent injunction. A partial judgment with such consequences is final for purposes of appeal. Forgay v. Conrad, 47 U.S. (6 How.) 201 (1848); Brown Shoe Co. v. United States, supra; see cases collected at 9 Moore's Federal Practice, ¶110.11 at 143-44. "All agree that the potential factor of irreparable injury is the supporting basis of appealability."[2/] 9 Moore's Federal Practice, ibid.

Treating the partial summary judgment as final does not increase the risk of piece-meal appeals here,--which might induce a finding of non-finality,--since the injunction provided for in the judgment independently rendered the judgment appealable. 28 U.S.C. §1292(a)(1). On the other hand, treating the judgment as non-final,

2/ The permanent injunction in this case, and its immediate irreparable consequences, fully distinguishes it from Liberty Mutual Ins. Co. v. Wetzel, supra, relied upon by defendants since in that case the complainants "requested an injunction, but did not get one; they requested damages, but were not awarded any; they requested attorneys' fees, b[illegible] received none." 424 U.S. at 742.

as defendants urge, would seriously jeopardize the proper judicial management of complex multi-phased civil rights class actions contemplated by Rule 23(d), Fed.R.Civ.P. See Chayes, "The Role of the Judge in Public Law Litigation," 89 Harv.L.Rev. 1281 (1976); Note, "Developments in the Law - Class Actions," 89 Harv.L.Rev. 1319, 1388-90 (1976); cf. Brown Shoe Co. v. United States, supra, at 306-11. It was apparently understood by the court below, when it specified Rule 54(b) certification, that appellate review and settlement of the fundamental legal issues raised by defendants should precede not follow the vast number of separate trials (potentially one for each of almost 400 class members) which were likely as a result of this Court's earlier mandate, particularly as a resolution of those issues adverse to the plaintiffs could render those trials unnecessary.

Once the finality of the partial summary judgment for purposes of appealability is seen, its finality for purposes of res judicata follows.[3/] Even without Rule 54(b) certification there is authority that such an appealable partial judgment is res judicata if not appealed from in a timely fashion. Durkin v. Mason & Dixon Lines, 202 F.2d 425 (6th Cir. 1953); see also Delta Drilling Co. v. Arnett, 186 F.2d 481 (6th Cir. 1950), cert. den., 340 U.S. 954 (1951); Diamond v. Thompson, 523 F.2d 1201 (5th Cir. 1975); First Federal Savings & Loan Ass'n. v. Zequeira, 305 F. Supp. 37 (D.P.R. 1969);

3/ Determinations themselves not final for appeal purposes are nevertheless binding as res judicata when they possess the characteristics of the judgment here involved and have otherwise once been the subject of review on appeal. Lummus Co. v. Commonwealth Oil Refining Co., 297 F.2d 80, 89 (2nd Cir. 1961), cert. den., 368 U.S. 986 (1962); Zdanok v. Glidden Company, 327 F.2d 944, 955 (2nd Cir. 1964).

but see 9 Moore's, Federal Practice, ¶110.11 at 149-50. Where, as here, Rule 54(b) certification confirms the appealability of a final partial judgment, the failure to appeal or the dismissal of the appeal from the judgment even more clearly renders that judgment res judicata as to the matters decided by it.[4/] Scholl v. District of Columbia, 331 F.2d 1018 (D.C. Cir. 1964); 6 Moore's, Federal Practice, ¶54.42 at 812-14.

(2)

Appellees argue that the prior judgments herein were properly vacated in light of an alleged change in the law following the decisions of the Supreme Court in International Brotherhood of Teamsters v. United States, 97 S.Ct. 1843 (1977) ("Teamsters"),and United Air Lines v. Evans, 97 S.Ct. 1885 (1977) ("Evans"). D.Br. 24-5. This contention is without merit.

There was no change in the sense of reversal of controlling Supreme Court decisional law justifying relief pursuant to Rule 60(b).[5/] The prior decision by this Court was cited with approval by the court in Teamsters. 97 S.Ct. at 1870. The District Court in granting partial summary judgment for 38 class members cited the decision of the Court of Appeals for the Seventh Circuit in Evans. The decision of

4/ According binding consequences to a Rule 54(b) certification enhances judicial management of class action litigation since it makes for binding disposition of issues fundamental to the future conduct of the litigation whether or not an appeal is taken or prosecuted, and, therefore, independent of the processing required of a party by certification under 28 U.S.C. §1292(b).

5/ Neither defendants nor the District Court have specified which subdivision of Rule 60(b) is deemed applicable.

the Seventh Circuit was, of course, not binding on this Court, and the proper way for defendants to have challenged the judgment which relied on the Seventh Circuit decision, was by means of an appeal to this Court.

As Judge Weinfeld noted in Wallace Clark & Co., Inc. v. Acheson Industries Inc., 394 F.Supp. 393, 395 (S.D.N.Y. 1975), aff'd, 532 F.2d 846 (2nd Cir. 1976), cert. den., 425 U.S. 976 (1976):

> "Rule 60(b)(5) contemplates relief from a judgment as a result of a later change in the law such as when a statute is amended or when a prior judgment is reversed or modified. See, e.g., Class v. Norton, 507 F.2d 1058, 1061-62 (2nd Cir. 1974). Moreover, relief from a judgment on the latter grounds is restricted to situations where the present judgment is based on the prior judgment in the sense of res judicata or collateral estoppel. Rule 60(b)(5) does not apply where a case relied on as precedent by the court in rendering the present judgment has since been reversed."

Even on the assumption that there was a change in controlling decisional law, the District Court erred in granting defendants' motion pursuant to Rule 60(b) after their time to appeal had expired. Schildhaus v. Moe, 335 F.2d 529 (2d Cir. 1969).

> "[Rule 60(b)] cannot be read to encompass a claim of error for which appeal is the proper remedy; such a reading would emasculate the provisions of Rule 73(a), now codified in 28 U.S.C. §2107, which strictly limit the time for appeal..." [Wagner v. United States, 316 F.2d 871, 872 (2d Cir. 1963).]

Consistent with this analysis, it has been without exception held that a change in decisional law, without more, does not warrant relief pursuant to Rule 60(b) after the time for appeal has expired.[6/] In Title v. United States, 263 F.2d 28 (9th Cir. 1959),

6/ Defendants' contention (D.Br. 25) that we have cited no cases in support of this proposition is frivolous. See Plaintiffs-Appellants Brief ("P.Br.") 23-7.

cert. den., 359 U.S. 989 (1959), cited by defendants (D.Br. 24), a Rule 60(b) motion was held properly denied under circumstances similar to those in the instant matter. In Title, the United States had filed a complaint to set aside an order granting citizenship, but had failed to file an affidavit showing good cause. The appellant's motion to dismiss the action because of the absence of this affidavit was denied and his certificate of naturalization was cancelled. The appellant filed a timely notice of appeal, which was dismissed for failure to prosecute. Two months after that dismissal, and less than one year from the original order by the District Court, the Supreme Court, in four cases, held that an affidavit of good cause must be filed in a denaturalization suit. Within six weeks of the first Supreme Court decision and three weeks of the last decision, the appellant moved to set aside the denaturalization judgment. In upholding the District Court's denial of this motion, the Ninth Circuit, after first noting that the filing of an affidavit of good cause was a "procedural" rather than a "jurisdictional" prerequisite, went on to state that:

> "Rule 60(b) was not intended to provide relief for error on the part of the court or to afford a substitution for appeal. Ackermann v. United States, supra; Morse-Starrett Products Co. v. Steccone, 9 Cir. 1953, 205 F.2d 244, 248-249; Berryhill v. United States, 6 Cir., 1952, 199 F.2d 217; Loucke v. United States, D.C.S.D.N.Y. 1957, 21 F.R.D. 305. Nor is a change in the judicial view of applicable law after a final judgment sufficient basis for vacating such judgment entered before announcement of the change. Collins v. City of Wichita, Kansas 10 Cir., 1958, 254 F.2d 837; Berryhill v. United States, supra; Loucke v. United States, supra." (Id. at 31.) (Emphasis supplied.)

> "Were Title's appeal presently before us, we would reverse the judgment of denaturalization rendered against him by the district court. But that appeal he has voluntarily failed to prosecute. He is in the same status as any other individual who fails to protect fully his valid legal rights, by neglecting to perfect his appeal." (Id. at 30.)

In Lubben v. Selective Service System Local Board No. 27, 453 F.2d 645 (1st Cir. 1972) ("Lubben"), Rule 60(b) relief was held improperly granted following a Supreme Court decision changing applicable law. The appellant had filed a post-induction notice claim for conscientious objector status. After the Selective Service Board refused to reopen his classification, appellant brought an action to enjoin his induction. The District Court, relying in part on Lane v. Local Board No. 17, 319 F.Supp. 1355 (D. Mass. 1970), held that the Board's actions amounted to a de facto reopening, and that the crystallization of appellant's conscientious objector status was a circumstance beyond his control pursuant to 32 CFR §1625-2. The District Court therefore enjoined appellant's induction without first reopening his classification and deciding his claim on the merits. The government's appeal from that order was subsequently dismissed upon its own motion. Shortly thereafter the Supreme Court held in Ehlert v. United States, 402 U.S. 99 (1971), that late crystallization of a conscientious objection to war was not a circumstance beyond one's control. The government's motion to vacate the injunction based on the supervening decision in Ehlert was granted. The First Circuit reversed this ruling, holding that none of the subdivisions of Rule 60(b) supported the motion:

"For a decision to be 'based on' a prior judgment within the meaning of Rule 60(b)(5), the prior judgment must be a necessary element of the decision, giving rise, for example, to the cause of action or a successful defense. See, e.g., Butler v. Eaton, 141 U.S. 240, 11 S.Ct. 985, 35 L.Ed. 713 (1891); Michigan Surety Co. v. Service Machinery Corp., 277 F.2d 531 (5th Cir. 1960); Block v. Thousandfriend, 170 F.2d 428 (2d Cir. 1948). It is not sufficient that the prior judgment provides only precedent for the decision....

If reliance upon Lane or if Lane itself was in error, this could have been corrected by an appeal of the Lubben injunction. Upon dismissal of the Lubben appeal that decision became final; a change in applicable law does not provide sufficient basis for relief under Rule 60(b)(5). See Title v. United States, 263 F.2d 28 (9th Cir.), cert. den., 359 U.S. 989. 79 S.Ct. 1118, 3 L.Ed.2d 978 (1959); Collins v. City of Wichita, 254 F.2d 837 (10th Cir. 1958); Berryhill v. United States, 199 F.2d 217 (6th Cir. 1952)....

Rule 60(b)(6), allowing relief for "any other reason justifying relief," is the residual clause of Rule 60(b). The reason asserted must be one other than those enumerated in 60(b)(1)-(5), and must be sufficient to justify the relief sought. The residual clause, like Rule 60(b) generally, is not a substitute for an appeal, and in all but exceptional circumstances, the failure to prosecute an appeal will bar relief under that clause....

In the instant case the government initially appealed both Lane and Lubben, but then made a conscious and deliberate choice not to pursue either appeal. It received a favorable decision in Lane only because of the plaintiff's cross-appeal. We do not speculate on the reasons why the government did not pursue its direct attack on the Lubben injunction; it is sufficient that the decision to do so was one of unfettered choice and free will. Having made that choice, the government must now live with its decision." (Id. at 650-52.)

In Collins v. City of Wichita, Kansas, 254 F.2d 837 (10th Cir. 1958), the court similarly held that a change in applic-

able decisional law, based on supervening Supreme Court decision, does not warrant Rule 60(b) relief:

> "It is quite clear that in extraordinary situations, relief from final judgments may be had under Rule 60(b)(6) when such action is appropriate to accomplish justice....A change in the law or in the judicial view of an established rule of law is not such an extraordinary circumstance which justifies such relief." (Id. at 839.)

Defendants' reliance on Theriault v. Smith, 523 F.2d 601 (1st Cir. 1975) ("Theriault"), is misplaced. That case does not reverse the First Circuit ruling in Lubben, and surely does not establish that a change in decisional law is sufficient to warrant Rule 60(b) relief.

In Theriault a Maine official had entered into a consent decree agreeing to include unborn children in calculating AFDC benefits pursuant to §406(a) of the Social Security Act. See Theriault v. Smith, 519 F.2d 809 (1st Cir. 1975). This decree was entered into following a ruling by the First Circuit that an unborn child was a dependent child for purposes of §606(a). When a later Supreme Court rejected the First Circuit view, the District Court vacated the consent decree. In affirming the action of the District Court, the First Circuit noted that a contrary decision would require the Maine official to continue to pay unauthorized AFDC benefits for the indefinite future. 523 F.2d at 602. Moreover, following the Supreme Court ruling, it was doubtful that the consent decree itself required continued payments:

> "[The] decree contained the undertaking that 'Defendant beginning Autust 1, 1974 will, pursuant to 42 U.S.C. §602(a)(10)

> and 42 U.S.C. §606(a), grant AFDC benefits... to otherwise eligible women...on behalf of their unborn children.' As the Court made clear in Alcala, the referenced provisions do not authorize such benefits. Defendant is therefore precluded from granting such benefits under their authority." (Id. at 602.)

The decree in Theriault, if continued in force, would have required illegal payments for an indefinite period for the benefits of persons who, by hypothesis, were not originally involved in the proceedings. Such a decree would have been an "instrument of wrong" upon a clear showing "of grievous wrong evoked by new and unforeseen conditions." United States v. Swift & Co., 286 U.S. 106, 115, 119 (1932). Granting the class members here the rightful seniority they would have had but for the prior illegal and discriminatory policies of defendants does not constitute a "wrong." Defendants were not required to assert a defense of timeliness, and their inability to raise that issue following the dismissal of their appeal hardly constitutes the "instrument of wrong" which would have resulted from continued enforcement of the consent decree in Theriault.

Just the other day this Court remarked in United States v. Cirami, N.Y.L.J., September 16, 1977, at 13, col. 2:

> "Very high among the interests in our jurisprudential system is that of finality of judgments. It has become almost a judicial commonplace to say that litigation must end somewhere, and we reiterate our firm belief that courts should not encourage the reopening of final judgments or casually permit the relitigation of litigated issues out of a friendliness to claims of unfortunate failures to put in one's best case."

Of course injustice should not go unremediated in the interest of finality. The accommodation between the competing values is Rule

60(b). But to assure that only "grievous wrong" shall disturb judgment finality, "Rule 60(b)(6) relief is only one of 'extraordinary circumstances,' Ackermann v. United States, 340 U.S. 193, 199 (1950), or 'extreme hardship,' United States v. Karahalias, [205 F.2d 331, 333 (2d Cir. 1953)]." United States v. Cirami, supra, at col. 1. Failing to perfect an appeal because of a wrong guess as to the state of Title VII law is no "extraordinary circumstance," it is no "extreme hardship" to the defendants to grant rightful seniority to correct demonstrated discrimination, and there is no judicial obligation to show "friendliness to claims of unfortunate failures to put in one's best case" where excusal is sought of a failure responsible for enormous expenditures of judicial and litigants' resources which would now be wasted by such excusal.

It is ironic that defendants should seek Rule 60(b) relief for their failure to timely appeal when defendants' defenses are ultimately bottomed on the legal contention that plaintiffs did not timely complain of discrimination. For defendants, what is extreme hardship for Rule 60(b) purposes requires revocation and denial of all rights and remedies for Title VII and 42 U.S.C. §1983 purposes. We believe the applicable authorities do not support such inequity in the exercise of the equitable power granted by Rule 60(b).

II.

PLAINTIFFS ARE ENTITLED PURSUANT TO TITLE VII AND 42 U.S.C. §1983, TO THE RELIEF VACATED AND DENIED TO THEM BY THE COURT BELOW.

In Cates v. Trans World Airlines, 15 FEP Cases 329, 334 (2d Cir. 1977) ("Cates"), this Court noted the failure of earlier

cases to distinguish the Title VII and/or 42 U.S.C. §1983 ("1983") violation from the appropriate remedy. Such a distinction is necessary at the outset of our reply to defendants' Title VII and §1983 discussion. For this purpose, we enumerate the discriminatory acts which, in themselves and/or through their perpetuation, constitute the violations in this action:

1. Discriminatory hiring practices through 1970:

It is undisputed that, at least prior to 1973, there was a quota limiting the number of women to be employed in the uniformed force of the PD. A. 14, 145. Examinations for the title of Policewoman were held on March 21, 1964 and October 25, 1969. During that same period, approximately 19 examinations were given for the titles of Patrolman and/or Police Trainee. These latter exams were open only to men. A. 199. There were three examinations for the position of Policewoman and 43 for the positions of Patrolman and/or Trainee in the period from 1959 to 1969. AD. 9-20. The Special Master found that if women had been afforded an equal opportunity to take entrance examinations between 1964 and 1969, forty-five class members would have been hired earlier than they actually were. In almost each case, the revised seniority date found by the Special Master was February 8, 1970 or earlier. A. 323-377. 400-464. 471-473, 488-521, 553-568.

2. Discriminatory hiring practices from 1970 - 1973:

On October 25, 1969, Examination No. 9080 ("Exam 9080") and No. 9081 ("Exam 9081") were given for the positions of Patrolman/Trainee and Policewoman, respectively. The questions on the two exams were identical. Most class members herein took and passed

Exam 9081. On May 8, 1970, approximately 125 men who passed Exam 9080 with scores of 84% or better, and were under 21 years of age on that date, were appointed to the position of Police Trainee. Women who took and passed Exam 9081 with scores of 84% or better and were under 21 years of age on May 8, 1970 were hired only after the lifting of the hiring freeze in 1973. A. 194-197. Between May 1970 and January 1973, during which time there was allegedly a freeze on hiring in the PD, men who had previously been hired as Trainees were appointed to the title of Patrolman. A. 526-528. No women were appointed to the PD during this period.

3. Discriminatory hiring practices from 1973 - 1975:

After the freeze was lifted on January 29, 1973, men and women were appointed to the PD from separate lists for Patrolman and Policewoman. AD. 21. Those appointments were from a pool consisting of men on at least 7 different Patrolman and Patrolman/Trainee lists (A. 574-576) and women from one Policewomen list,--that resulting from Exam 9081 (A. 575). Between January 29, 1973, and the June 30, 1975 lay-offs, 4,236 males and 513 females were appointed to the PD. A. 576; AD. 21-22. Less than 11% of all persons appointed to the PD after the freeze were female. A. 576. Approximately one-quarter of all persons taking tests in October 1969 and December 1973 open to women, were female. A. 68, 272, 576.

4. Failure to grant rightful seniority on date of hire:

Most class members were hired as Policewomen in 1973 or 1974. In virtually all cases, the PD calculated their seniority on the basis of their actual date of appointment, even where a class

member would have been hired earlier but for the discriminatory hiring practices of defendants.

5. The June 30, 1975 lay-offs:

On June 30, 1975, the defendants laid-off police officers based upon a merged list of Patrolmen and Policewomen although these separate titles are provided for in §§434a-1.0, 2.0 of the New York City Administrative Code, and although this ultimately resulted in the lay-off of approximately 60% of all policewomen as compared with less than 20% of all Patrolmen. A proportionate lay-off based upon the separate titles of Patrolman and Policewoman would have avoided this disparate impact. Moreover, although women had been previously discriminated against in PD hiring, the defendants calculated their seniority dates for lay-off purposes on the basis of their date of hire, not the seniority date they would have had if they had been provided an equal opportunity to take entrance examinations. In sum, class members were originally kept on sex-separated lists for purposes of appointment, which delayed their appointment to the PD for as much as seven years (see, e.g.,432-434), and were then placed on a merged list for lay-off purposes, which guaranteed that 60% of all women in the PD would be terminated, and which resulted in discriminatory assignments of those small number of women who were not laid-off (A. 533).

6. The Rehirings:

Prior to the intervention of the District Court following the decision of this Court, the rehirings to the PD, also based on a merged list of Patrolmen and Policewomen, followed a pattern even

more disparate than the June 30, 1975 lay-offs. 204 of the 205 rehirees effected on April 1, 1976 were men. A. 260.

A.

Teamsters and Evans do not sustain the decision below so far as it deals with Title VII.

Defendants essentially argue that Teamsters and Evans, read together, exempt the discrimination-perpetuating effect of a bona fide seniority system, whether the discrimination is pre-Title VII (here March 24, 1972) or post-Title VII, so as to exculpate the disparate June 30, 1975 PD lay-offs unless those lay-offs are otherwise shown to be discriminatory in nature, and that any independent post-Title VII discrimination in hiring has not been established or shown to be the subject of a timely complaint. D.Br. 26-37. According to defendants, Hazelwood School District v. United States, 45 U.S.L.W. 4882 (1977), establishes that the foregoing arguments are applicable to discrimination by public employers. D.Br. 38-40.

(1)

The post-Title VII acts of discrimination already enumerated (see pp. 15-18 , supra) clearly caused the sex-disparate impact of the June 30, 1975 lay-offs (see pp. 21-25, infra). It is, therefore, fundamental to defendants' argument to prove that Teamsters and Evans immunize, under §703(h) of Title VII, the disparate impact on race or sex of a neutral seniority system perpetuating unlawful post-Title VII discrimination. The argument fails because no case cited by defendants so holds and Teamsters establishes that such a pattern constitutes a Title VII violation.

In Teamsters, where the operation of the seniority system had a disparate impact by race, it was stipulated by all, and the Court acknowledged that post-Title VII discrimination would be remediated by the rightful seniority prescribed by Franks v. Bowman Transportation Co., 424 U.S. 747 (1976) ("Franks") and approved in Teamsters. 97 S.Ct. at 1859-61. In Evans it was not disputed that the seniority system operated neutrally and had no disparate impact on women. 97 S.Ct. at 1889-90. Evans' claim was that the seniority system perpetuated the injury of earlier time-barred discrimination and was not otherwise disparate in its purpose or impact. Id. at 1888-89; see P.Br. 44-6. Cates likewise involved a seniority system stipulated to be non-discriminatory in its current operation. See P.Br. 46.

By way of contrast, here the seniority system so operated in the lay-offs as to impact in a grossly disparate manner on Policewomen, and did so as a result of the described post-Title VII discrimination in the hiring of such Policewomen. See pp. 15-18, supra. Rightful seniority remediation is expressly authorized, in contemplation of such circumstances, by Teamsters:

> "Post-Act discrimination, however, may obtain full 'make whole' relief, including retroactive seniority under Franks v. Bowman, supra, without attacking the legality of the seniority system as applied to them. Franks made clear and the union acknowledges that retroactive seniority may be awarded as relief from an employer's discriminatory hiring and assignment policies even if the seniority system agreement itself makes no provision for such relief. 424 U.S., at 778-779, 96 S.Ct., at 1271. Here the Government has proved that the company engaged in a post-Act pattern of discriminatory hiring, assignment, transfer and promotion policies.

> Any Negro or Spanish-surnamed American injured by those policies may receive all appropriate relief as a direct remedy for this discrimination." (97 S.Ct. at 1860-61.)

Since remediation of disparate impact perpetuating post-Act discrimination is thus expressly prescribed by Teamsters, the illegality of that impact, not the seniority system, is necessarily implicated.

Defendants rely heavily on Teamsters footnote 30 (id. at 1861) following the quoted text to show that a non-discriminatory seniority system may perpetuate unlawful post-Title VII discrimination. D.Br. 32. Such a reading of the footnote would, of course, totally consume the quoted text to which it is attached and would, further, be unsubstantiated by the Court's construction of §703(h) which was solely in the context of a "seniority system which perpetuated the effects of pre-Act [sic] discrimination" (id. at 1861), and solely in terms of the legislative history and intent to protect seniority rights which accrued and vested pre-Title VII. 97 S.Ct. at 1861-65. The reference in footnote 30 to the "legality of the seniority system insofar as it perpetuates post-Act discrimination" expressly reflects the injunction issued by the lower court against implementation of the seniority system as it impeded "the free transfer of minority groups into and within the company." Id. at 1852. Neither Franks nor Teamsters, nor our position here, would thus adjudicate a seniority system as unlawful because it perpetuates post-Act discrimination in its disparate impact. The illegality is the disparate impact resulting from perpetuation of post-Act discrimination, not the seniority system, and rightful seniority,--which validates rather than invalidates the seniority system,--is the remedy. Thus

understood Teamsters footnote 30 is in harmony with the entire Teamsters opinion. The teaching of the cases, then, is that post-Title VII discrimination resulting in disparate impact in the operation of a neutral seniority system is to be remediated by rightful seniority.

(2)

Post-Title VII discrimination here is clear. The 1973 post-freeze hiring was concededly from sex-segregated lists,--at least 7 restricted to men, 1 to women. A. 575; see also A. 549.[9/] As a result of the limited opportunities for women to compete for PD appointments, it is undisputed that from January 29, 1973 to the date of the lay-offs, less than 11% of all PD appointees were females although women comprised 25% of all persons taking relevant PD exams to which women were admitted. A. 576. It is of no consequence that the sex-segregated examinations for the sex-segregated lists used in the 1973 hirings, were held in 1969 or earlier. The 1973 hiring perpetuated the earlier sex-discriminating examinations, and any discrimination-perpetuating mechanism other than a seniority system protected by §703(h) is a violation of Title VII. Griggs v. Duke Power Co., 401 U.S. 424 (1971); Teamsters at 1861; see P.Br. 33-4. The disparity in Post-Title VII PD appointments of men and women, directly resulting from and reflecting pre-Title VII PD discrimination against women [not immunized by §703(h) or otherwise],

9/ In view of defendants' unjustified complaint that our earlier brief refers to matter not before the court below (D.Br. 42-3), our record references hereinafter, except where otherwise indicated, are confined to matters in the Appendix and we will specifically point out how any other matters are of record before the District Court.

is not contraverted[10/] and irrefutably establishes a violation of Title VII.

Defendants do not here seriously contest the described post-Title VII discrimination in hiring, but argue that the complaints of the named plaintiffs here as to such discrimination were not timely filed with the EEOC. D.Br. 31-7. But this argument does not take into account that the complaints were concededly timely with respect to the June 30, 1975 lay-offs. As we have seen, the disparate impact of those lay-offs violates Title VII to the extent that post-Title VII discrimination is perpetuated by the seniority system governing the lay-offs. It is, therefore, decisive that here the post-Title VII hiring discrimination was a process which unlawfully perpetuated past discrimination, and the lay-offs pursuant to the seniority system perpetuated that post-Title VII unlawful hiring process.

Unlike the post-Title VII lawful hiring in Teamsters and Evans of pre-Title VII discriminatees, here the post-Title VII hiring process was unlawful and the discrimination thus practiced was, precisely, the post-Title VII continuation and implementation of pre-Title VII discrimination. And so the disparate June 30, 1975 lay-offs reflected and further implemented the unlawful post-Title VII hiring process as that process carried forward the pre-Title VII discrimination. The class members-discriminatees establishing pre-Title VII revised seniority dates were laid off because their hiring in 1973 , post-Title VII, was by a process which perpetuated and implemented the very discrimination which prevented their being hired earlier. Nothing in Teamsters, Evans, or defendants' brief fore-

10/Defendants claim that some women were appointed earlier in 1973 (cont'd.)

closes the vulnerability of the lay-offs under Title VII in such circumstances.

The lay-offs are also independently a violation of Title VII because of the manner in which the lay-off roster was formulated. P.Br. 5-6, 35-40. Defendants' response is that the point was not raised by plaintiffs prior to defendants' Rule 60(b) motion, and that the matter is properly one for disposition after further hearings "left open...by the District Court."[11/] D.Br. 30-1, 40-1. In addition, defendants contend that if the merged lay-off roster was the violation, proportionate lay-offs not the revised seniority here sought by plaintiffs would be the appropriate remedy. D.Br. 31.

Defendants do not say and we do not know why it is significant that the merged lay-off roster was not raised by plaintiffs prior to the Rule 60(b) motion. Teamsters and Evans held that the immunizing effect of §703(h) turned on whether a seniority system was initiated, "negotiated and has been maintained free from any illegal purpose." See P.Br. 32. And since Teamsters and Evans were,

(cont'd):than men who took a separate but identical test as those women. D.Br. 5. If true, this coincidence is irrelevant since their relative scores are not mentioned by defendants, and, moreover, the point does not meet the objection that women were appointed only from the one list referred to by defendants while men were appointed from seven lists as defendants admit. Ibid.

11/ Defendants assume that the court below contemplated a trial on the lay-off issue for Title VII purposes. D.Br. 31 n. 41. But the opinion appears to limit that issue to the §1983 claim. See P.Br. 13-4, 30 n. 24.

of course, first raised on the Rule 60(b) motion, it was appropriate then to point out by way of response that the seniority system was not the neutral, non-discriminatory system contemplated by those cases.

Substantially all the proof on the Title VII illegality of the use of the merged lay-off roster which we have discussed in our brief here was before the District Court.[12/] See record references at P.Br. 5-6, 35-40. That proof establishes conclusively that the merged lay-off roster (i) was not mandated by law, (ii) was selected sometime after late 1974,(iii) with certain knowledge that it would impact far more prejudicially upon the Policewomen than would a separate Policewoman lay-off roster which would have been authorized by law. See P.Br. 35-39. None of the components of the foregoing formulation are disputed by defendants in their brief here or in the papers they submitted below. Questions are raised by defendants whether the Patrolman and Policewoman titles were merged by June 30, 1975 for internal PD and for some budgetary purposes. D.Br. 4-6,41. Even if it could be assumed, contrary to the proof, that such limited merger occurred, it is irrelevant. It is not denied that separate titles existed by law, that separate lay-off rosters were authorized by law, that the decision to use a merged lay-off roster came after late 1974, and that that decision was made with knowledge of its

12/ The plaintiffs' brief here refers to an April 1977 New York City Human Rights Commission finding of probable cause and references an exhibit on the motion for a stay before this Court. P.Br. 37. The same exhibit was before the District Court. A.533. In addition, the brief references the aforesaid motion as to some PD 1976-77 documents. P.Br. 37. Similar proof was before the court below. A. 532-33, 536-38.

grossly disparate impact. It is, therefore, decisive for Title VII purposes that, in the face of our argument here and in the court below that there was no justification for the merged lay-off roster (P.Br. 39-40), no such justification was ever suggested by defendants below, in their brief to this Court, or in their record references[13/] (D.Br. 40-1). Disparate impact by sex resulting from an employment selection practice,--even if not intentionally discriminatory,--is undeniably a Title VII violation[14/] where no substantial justification for such disparity is shown. Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425-36 (1975). On this state of the record, the June 30, 1975 lay-offs are indisputably Title VII violations which cannot be considered time-barred.

13/ The only record reference by defendants relevant to the formulation of the lay-off roster (D.Br. 41) is to the Police Commissioner's statement that in "determining" the lay-off order, "seniority and probationary status were the only factors that were considered" (A. 487). Obviously this does not bear upon the decision to use a merged lay-off roster since seniority and probationary status are also factors utilized for separate lay-off rosters.

14/ The selection of a merged lay-off roster (as compared with separate lay-off rosters) is not the application of differing terms or conditions of employment "pursuant to a bona fide seniority...system" immunized by §703(h). The application of the seniority system occurred here after the selection of the system to be used. Any seniority system established post-Title VII is not covered by §703(h) according to an Interpretative Memorandum of the EEOC. 95 LRRM 235 (1977). Here the selection of the system was vulnerable not only because it was post-Title VII, but also because it was selected with knowledge of its avoidable disparate impact.

Defendants object that if the lay-off rosters violate Title VII, the remedy is proportionate lay-off of men and women, not the rightful seniority awarded. D.Br. 41. This analysis is fallacious. Once the PD elected to use a merged list of Patrolmen and Policewomen for lay-off purposes, instead of using separate lists, it then became appropriate to grant women in the PD their rightful place in the seniority system. Therefore, the revised seniority dates awarded to class members by Judge Duffy and the Special Master represent, at a minimum, the seniority dates which should have been used by the PD in determining the susceptibility of these class members to lay-offs once the decision had been made to utilize a merged list.[15/] Moreover, even if relief is based upon the right to proportionate lay-off, rightful seniority is not thereby foreclosed. The relative seniority rights among all the women would have to be determined in the event of proportionate lay-off relief, and rightful seniority would be material. In any event, pending the determination of proportionate lay-off relief, it would be appropriate to implement the revised seniority dates already fixed for class members-discriminatees.

(3)

We argued that the Teamsters and Evans inhibitions against reaching pre-Title VII discrimination did not apply to public employers. P.Br. 40-4. Defendants insist that Hazelwood School District v. United States, 45 U.S.L.W. 4882 (1977), defeats our position. D.Br. 38-40. Defendants' reliance on Hazelwood is misplaced.

15/ We do not mean to imply that the use of a merged list for lay-off purposes was proper. What is contended, however, is that once the decision was made to use a merged list, the PD was obligated to give class members their rightful place on that list.

Hazelwood was a pattern and practice suit brought by the Attorney General[16] based, in part, upon a statistical imbalance in the number of black faculty employed by the Hazelwood School District. The Court held that the United States must establish the existence of discriminatory practices after March 24, 1972, the date Title VII became applicable to public employees, to sustain its burden.

The 16 alleged individual victims of discrimination cited by the Court of Appeals in Hazelwood applied for positions after March 24, 1972. United States v. Hazelwood School District, 534 F.2d 805, 814-19 (8th Cir. 1976). There was, therefore, no issue in Hazelwood of an award of retroactive seniority to a date earlier than March 24, 1972. The only individual relief specifically directed by the Court of Appeals for the 16 victims of discrimination was placement on a preferred hiring list, and back pay for two of the alleged victims. 534 F.2d at 819-20. Hazelwood, therefore, does not involve, decide, or even discuss the issue of granting retroactive seniority pursuant to Title VII to public employees to a date earlier than March 24, 1972, in an action brought by those employees, not the Attorney General. The holding in Hazelwood is that to establish a pattern and practice suit under Title VII, the United States must establish post-Title VII violations. A private litigant, unlike the government in a pattern and practice suit, may allege pre-Title VII violations of §1983 which are unlawfully perpetuated after the effective date of Title VII.

16/As the jurisdiction of the Attorney General in pattern and practice suits is limited to violations of Title VII, the issue of the illegality of any pattern or practice of discrimination prior to the effective date of Title VII to public employer was not and could not have been in issue. See 42 U.S.C. §2000e-6.

In extending Title VII to public employment in 1972, the Congress was cognizant of existing constitutional and statutory rights against discrimination in such employment, and undertook to provide alternate remedies "to the existing prohibition against discrimination perpetuated 'under color of state law' as embodied in...42 U.S.C. §1983." H.R. Rep. No. 92-238, 92d Cong., 2d Sess., 1972 U.S. Code & Admin. News at 2154. For precisely this reason this Court has held Title VII remedies to be available to pre-Title VII discrimination already cognizable as a violation of federal law. Brow General Services Administration, 507 F.2d 1300 (2d Cir. 1974, d on other gr., 425 U.S. 820 (1976). This Court has consistently indicated that pre-Title VII discrimination constituting violations of pre-Title VII substantive rights are remediable under Title VII. See P.Br. 42-3. Just such a condition exists here by reason of the §1983 and Fourteenth Amendment violations occasioned by the pre-Title VII discrimination against the plaintiffs.

B.

The decision of the court below was also in error by reason of §1983.

The parties are, apparently, agreed that the applicable statute of limitations for §1983 purposes is three years and that the operative date is June 1972. D.Br. 46. We showed that the 1973 hiring practices and 1975 lay-offs, fully described at pp. 15-18, supra, constitute §1983 violations,--particularly in view of Chance v. Board of Examiners, 534 F.2d 993 (2d Cir. 1976), cert. den., 45 U.S.L.W. 3806 (1977) ("Chance IV") ,--which were timely brought and amenable to the relief granted prior to the Rule 60(b) motion.

See P.Br. 54-65. Defendants argue that the lay-offs are immunized under §1983 exactly as under §703(h), that as to any other §1983 violation issues of fact remain to be tried, and that relief against the individual defendants is unavailable since they assumed office January 1974 after the 1973 discriminatory hiring practices had been substantially completed. D.Br. 43-7.

(1)

Chance IV holds that the disparate impact, by race, of a neutral seniority system in the case of lay-offs, where that disparity reflects the lesser seniority of those who were deterred from taking racially discriminatory exams, is a violation of §1983 remediable by rightful seniority.[17/] If so, Chance IV squarely sustains by way of §1983 both the violation found and the relief authorized herein by this Court and by the court below before the Rule 60(b) motion. See P.Br. 56-9, 64-5.

Defendants do not deny the applicability of Chance IV since they make no effort to distinguish it. D.Br. 43-5. Instead defendants read Chance IV to incorporate §703(h) into §1983, thereby immunizing the seniority system, and argue that "[t]o the extent that Chance IV approved a grant of retroactive seniority under §1983" it "is no longer viable" under Teamsters and Evans. Ibid. According to defendants, therefore, Teamsters and Evans not only overruled this Court's decision in Acha v. Beame, but also its decision in Chance IV notwithstanding the denial of certiorari in Chance IV after the decisions in Teamsters and Evans.

17/ The August 11, 1977 decision of this Court in Chance v. Board of Examiners, Docket No. 76-7348, does not disturb any aspect of Chance IV. The results of Chance IV were not there challenged.

The basic error in defendants' reading of the cases is defendants' persistent failure to distinguish between the legality of a bona fide seniority system and the illegality of its disparate impact to the extent that it perpetuates unlawful discrimination,--post-Title VII in Teamsters, and post-§1983 here and in Chance IV. This Court in Chance IV, just as the Supreme Court in Teamsters (see pp. 20-21, supra), carefully safeguarded the legality and integrity of a bona fide seniority system, and found illegal only the disparate impact resulting from perpetuation of prior unlawful discrimination.[18/] Consequently, this Court's reference in Chance IV to §703(h)'s validation of the seniority system for §1983 purposes, did not contradict the Court's remediation of the racially disparate lay-offs through the grant of rightful seniority to those who proved earlier discrimination. The §1983 violation found by the Court in Chance IV was the disparate impact in lay-offs reflecting earlier unlawful discrimination, and the remedy prescribed was rightful seniority in a legal seniority system. These Chance IV principles remain intact and directly govern here.

(2)

Defendants' statute of limitations argument does not affect the impact of Chance IV here. The disparate lay-offs constituting the §1983 violation occurred in 1975. The hirings, with their attendant inappropriate seniority dates for discriminatees, occurred

18/Cates, cited and relied upon by defendants (D.Br. 45), is consistent with and does not overrule Chance IV since Cates did not involve disparate impact by sex or race. See P.Br. 46-7.

in 1973-74. Defendants have assumed, "arguendo," at least for Title VII purposes, "that the defendants discriminated against plaintiffs herein until they were hired in 1973." D.Br. 32,34. The hirings here were independent §1983 violations since they were from sex-discriminatory lists and therefore constituted an unlawful selection process. See pp. 16-17, supra. Even in the case of a lawful hiring process, where the hiree is the victim of past, time-barred discrimination and complains of loss of seniority sustained at the time of hire, this Court left open and undecided whether the statute runs from the time of hire. Cates at 336 n. 10. We have already shown that the circumstances here involved compel that that issue be resolved to toll the statute at least to the date of hire.[19/] See P.Br. 51-2.

(3)

If the §1983 violations we rely upon here, not those cited by the court below, are considered, there remains no factual issues to be tried (other than those prescribed earlier herein by this Court). It is not controverted that tiny quotas for hiring women in the PD continued until 1973, and that from January 29, 1973 to June 30, 1975:

19/ Defendants did not discuss our construction of the issue left open by Cates and appear, rather, to assume that Title VII §706(e) is tolled until the date of "failure to assign plaintiffs constructive seniority at the date of hire." D.Br. 34.

appointments were made from sex-segregated lists resulting from sex-segregated tests; the pool used for such appointments in 1973 necessarily reflected prior discriminatory quotas; and eight times more men than women were hired, though women comprised 25% of the candidates on examinations for which women could compete. See p. 16 ,supra. It is not disputed that class members found by the Special Master and the Court below to be discriminatees, were not given the rightful seniority dates, fixed herein by the Special Master, at the time they were hired; that no such class member was granted a revised seniority date before the layoffs; and that the June 30, 1975 lay-offs impacted disparately upon Policewomen (60%) as opposed to Patrolmen (20%). See p. 17,supra. All these events are beyond dispute and none needs further hearing for their establishment.

The sum of the described events, particularly in view of Chance IV, constitutes a violation of §1983. The fact that the discrimination was by sex not race does not change the Chance IV result.[20/] Apart from the claimed constraint of the statutory seniority system, no justification has been proferred by defendants for the described discrimination against women. See P.Br. 54-6. Instead the record shows defendants' acknowledgment of a lack of any such justification. A. 270-71; AD. 67. No matter which test is used to evaluate the constitutionality of sex discrimination (see A. 597-

20/ In Chance IV the underlying discriminatory exams were not expressly confined to one race and, therefore, less clearly discriminatory than the exams here which were expressly and intentionally confined to one sex. See Teamsters at 1845 n. 15.

99), the total absence of any justification for distinctive or disparate treatment by sex means the denial of due process and equal protection. See P.Br. 56. Accordingly, unjustified discrimination against women in police hiring has been held to violate §1983. Schaefer v. Tannian, 394 F.Supp. 1128 (E.D.Mich. 1974) modified, 538 F.2d 1234 (6th Cir. 1976); see also Loy v. City of Cleveland, 8 FEP Cases 614 (N.D. Ohio 1974); Shpritzer v. Lang, 13 N.Y.2d 744 (1963); Mize v. State Division of Human Rights, 31 N.Y.2d 1032 (1973).

(4)

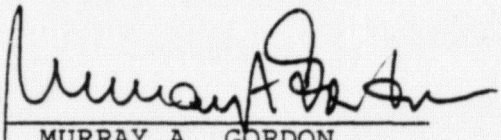
Defendants seek to trivialize the §1983 aspect of this case by confining liability thereunder to the individual defendants for their individual activities after January 1974. D.Br. 46-7. It is clear, however, that local officials have historically been responsible in their official capacity in §1983 actions seeking injunctive or declaratory relief. See P.Br. 61-2. And this Court has recognized that in such an action, reinstatement, back pay, etc., are available against the defending official qua official as an adjunct of the equitable or declaratory relief sought. Monnell v. Department of Social Services, 532 F.2d 256, 262-64, 267 (2d Cir. 1976), cert. gr., 45 U.S.L.W. 3508 (1977); see also P.Br. 62. The summary judgment and injunctive relief here sought by plaintiffs come within the described bounds of the liability of the individual defendants qua officials so that those defendants are liable for the full range of §1983 violations here proven and established, and they are subject to the remedies heretofore granted.

Conclusion

The order appealed from should be reversed, and the injunctive relief vacated and denied should be reinstated and granted.

Respectfully submitted,

GORDON & SHECHTMAN, P.C.

By: 

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Service of three (3) copies of the within
is admitted this 3rd day of October 1977

Leonard Koerner

on behalf of W. Bernard Richland Corporation Counsel

10/3/77